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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAR - 9 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
U S West Petition for Imposition of End User)
Common Line Charges)

CC Docket No. 97-149
CCB/CPD 98-7

MCI OPPOSITION TO PETITION FOR WAIVER

I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its Opposition to the Petition for Waiver filed by U S West Communications, Inc. (U S West) on February 2, 1998.

In its waiver petition, U S West requests that the Commission permit it to temporarily increase its multiline business Subscriber Line Charge (SLC) above the ceiling otherwise permitted by the Commission's rules for six months. U S West states that the temporary increase would permit it to recover amounts that it "underrecovered" from its end user customers during the period July 1 through December 31, 1997.¹ This "underrecovery" of SLC revenues was a result of U S West's 1997 annual access filing BFP forecast, which the Commission found in the 1997 Annual Access Order to be

¹Petition at 1.

unreasonably low.² Now, U S West seeks to recover the additional end user revenues it would have earned between July 1, 1997 and December 31, 1997 had it charged the higher SLC rate corresponding to the BFP forecast prescribed by the 1997 Annual Access Order.

The proposed SLC increase would permit U S West to collect revenues from end users that equal the refund it owes to its interexchange carrier customers. In the 1997 Annual Access Order, the Commission found that, as a result of U S West's unreasonably low BFP forecast, its resulting CCL rates were unjustifiably high, in violation of Section 201(b) of the Communications Act, and ordered U S West to refund the overcharges.³ U S West argues that the 1997 Annual Access Order refund requirement "will have the effect of disallowing a substantial portion of U S West's Common Line revenue requirement, unless U S West is allowed to collect from end users the amounts it would have charged them had its BFP forecast matched the Commission's subsequent prescription."⁴

U S West believes that the Commission can authorize the proposed SLC increase by waiving Sections 61.45(d), 61.46(d), and 69.152 of the Commission's rules. The requested waiver of Section 61.45(d) would permit U S West to increase its PCI above

²1997 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 97-149, released December 1, 1997 (1997 Annual Access Order).

³1997 Annual Access Order at ¶21.

⁴Petition at 3.

the level that would otherwise be permitted by the Commission's rules.⁵ The requested waiver of Section 61.46(d) would permit U S West to target the entire PCI increase to the multiline business SLC, without affecting its CCL computation.⁶ Finally, the requested waiver of Section 69.152 would permit U S West to increase its multiline business SLC rate above the \$9.00 cap in some states.⁷

The Commission should deny the relief that U S West seeks because the proposed SLC increase would violate the well-established prohibition against retroactive rate increases.

II. U S West's Proposed Retroactive Rate Increase is Unlawful

Under the Commission's price cap regime, the price cap index (PCI) operates to define a "zone of reasonableness." Accordingly, the Commission has made clear that PCI increases other than those due to exogenous cost changes or the operation of the X-Factor will be permitted only in the unlikely event that a carrier can demonstrate that an adjustment in allowed rate levels is necessary to prevent a confiscatory outcome.⁸ U S West has not even attempted to make such a showing.

Instead, U S West makes clear that the purpose of the proposed PCI increase would be to permit it to recoup lost SLC revenues. This retroactive rate increase would

⁵Petition at 5.

⁶Petition at 5.

⁷Petition at 4.

⁸LEC Price Cap Order, 5 FCC Rcd at 6807.

clearly violate the “filed rate doctrine,” under which a common carrier may only charge the rates covered by its tariff on file and in effect at a particular time, and cannot increase such rates retroactively. As the Supreme Court explained in Tennessee Gas, even when a rate is found to be less than the maximum that would have been permitted and is raised prospectively, “the company cannot recoup its losses by making retroactive the higher rate.”⁹ The Court held that “[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its actions including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.”¹⁰

The Commission has, on several occasions, rejected LEC attempts to offset refunds with retroactive increases in other rates. In the 800 Data Base Reconsideration Order, for example, the Commission relied on Tennessee Gas in concluding that “to the extent incumbent LECs are arguing that they should be entitled to actually recoup monies they could have earned by retroactively increasing rate elements in certain baskets . . . this has been consistently rejected as retroactive ratemaking.”¹¹ More recently, the Bureau rejected Bell Atlantic’s attempt to offset refunds of common line basket overcharges with retroactive rate increases in other baskets, noting that there is a

⁹Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145, 152 (1962) (Tennessee Gas).

¹⁰Id.

¹¹In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order on Reconsideration, CC Docket No. 93-129, released April 14, 1997, at ¶17 n.44 (800 Data Base Reconsideration Order).

“longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases.”¹²

An agency may only permit a retroactive rate increase when adequate notice is provided.¹³ When the Commission has provided for retroactive rate increases, it has done so explicitly by indicating that rates are interim and subject to trueup, and by invoking its authority under Section 4(i) of the Act.¹⁴ Recently, in rejecting SWBT’s similar proposal to increase its EUCL rates retroactively, the Bureau stated that “the Commission does not ordinarily allow carriers . . . to recoup past undercharges, or to offset revenues foregone from one rate element against refunds owed for overcharges, absent unusual circumstances and prior notice to customers.”¹⁵ Because neither the Suspension Order nor the Designation Order placed U S West’s end user customers on notice that they could be subject to prospective rate increases, the Commission cannot permit U S West to increase its rates retroactively.

There is no merit to U S West’s argument that the requested waivers should be granted because the 1997 Annual Access Order would otherwise have the effect of

¹²In the Matter of 1993 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 93-193, released June 25, 1997, at ¶15.

¹³Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791, 796 (D.C. Cir. 1990).

¹⁴See In the Matter of Tariffs Implementing Access Charge Reform, Memorandum Opinion and Order, CC Docket No. 97-250, released December 30, 1997, at ¶7 (citing Lincoln Telephone, 72 FCC 2d 724, 728-29).

¹⁵In the Matter of Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal No. 2683, Memorandum Opinion and Order, rel. January 30, 1998, at ¶13 (emphasis added).

“disallowing a substantial portion of U S West’s Common Line revenue requirement.”¹⁶

Nothing in the price cap rules or orders defines the price cap index as a guaranteed level of recovery for the LEC; the primary purpose of the PCI is simply to define a “no-suspension” zone for the tariff review process.¹⁷

Because there is no question that U S West is trying to do the very thing prohibited by Tennessee Gas — recoup its losses by making retroactive the higher rate subsequently allowed — the Commission should deny U S West’s waiver petition.

III. There is No Basis for Reducing the Refund Amount

U S West suggests that, as an alternative to the requested rule waivers, the Commission could rescind the refund requirement or reduce the refund amount.¹⁸ To the extent that U S West’s petition requests changes to the refund provisions of the 1997 Annual Access Order, it should be rejected as an untimely petition for reconsideration. In any event, U S West’s arguments are without merit.

There is no basis for U S West’s contention that the refund is “unfair” because the Commission’s forecast “appears to have been no more accurate than U S West’s.”¹⁹ As an initial matter, U S West’s claim that the Commission’s forecast was inaccurate is

¹⁶Petition at 3.

¹⁷LEC Price Cap Order, 5 FCC Rcd at 6788.

¹⁸Petition at 6-7.

¹⁹Petition at 6 n.11 (citing U S West Comments on Bell Atlantic Petition for Reconsideration, January 21, 1998, at 2-3 (U S West Comments)).

based on unverified and incomplete 1997 cost data.²⁰ The accuracy of any 1997-98 BFP forecast cannot be evaluated until complete cost data for both 1997 and 1998 is available. More importantly, while no forecasting methodology can be guaranteed to produce a completely accurate forecast, the autoregressive method can be relied on to produce a reasonable forecast.²¹ U S West's forecasting methodology, by contrast, had been shown to consistently underforecast the BFP by a substantial margin.²² Even U S West admits that it is likely that, as in every previous year of price cap regulation, its 1997-98 BFP forecast will be shown to have underforecasted its BFP.²³

Moreover, it is not true that an autoregression run with additional data points, either 1997 or 1989-1990, is "unquestionably more accurate than the autoregression the Commission used to prescribe U S West's per line BFP."²⁴ U S West's 1997 data point is of questionable validity because it is based in part on estimated data.²⁵ The 1989 and 1990 data points are similarly of questionable validity, for at least two reasons. First, it appears that U S West selected 1989 and 1990 in order to find a data point (1989) that would have the effect of driving down the BFP forecast. Second, the 1989 and 1990 data points reflect costs incurred under the very different incentive structure of rate of

²⁰U S West Comments at 2.

²¹1997 Annual Access Order at ¶78.

²²1997 Annual Access Order at ¶48.

²³U S West Comments at 2.

return regulation, and should therefore not be included in a data set used in forecasting a price cap carrier's BFP. The Commission's BFP forecast correctly employed only cost data that had been reported in ARMIS, and only data from the years that U S West was regulated under price caps.

IV. Conclusion

For the reasons stated herein, MCI recommends that the Commission deny the petition for waiver filed by U S West.

Respectfully submitted,
MCI TELECOMMUNICATIONS
CORPORATION

A handwritten signature in black ink, appearing to read "Alan Buzacott".

Alan Buzacott
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March 9, 1998

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on March 9, 1998.



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CERTIFICATE OF SERVICE

I, John E. Ferguson III, do hereby certify that copies of the foregoing Opposition of MCI to the US West Petition for Waiver in the Matter of Imposition of End User Common Line Charges were sent, on this 9th day of March, 1998, via first-class mail, postage pre-paid, to the following:

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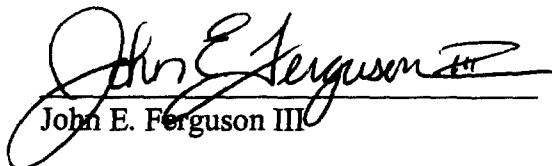
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